United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1404

United States Court of Appeals

Docket No. 76-1404

FOR THE SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARRY LEVINE BENSON, et al.,

Defendants-Appellants.

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC* FOR APPELLANT HARRY LEVINE BENSON

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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-against-

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Docket No.

76-1404

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC FOR APPELLANT HARRY LEVINE BENSON

Appellant Harry Levine Benson seeks, pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, rehearing, with a suggestion for rehearing en banc, from a judgment of this Court (Mulligan, Timbers and Van Graafeiland, C. J. J.) entered January 6, 1977, affirming a judgment of the United States District Court for the Southern District of New York (the Honorable Charles H. Tenney) convicting appellant Benson of conspiracy to defraud, utilization of a wire communication in interstate and foreign commerce in the execution of the scheme to defraud and inducing an individual to travel in interstate and foreign commerce in the execution of a scheme to defraud and sentencing him to a term of imprisonment of four (4) years to be followed by a three (3) year period of probation.

On appeal it was Benson's position that the District Court had erred in denying his motion for a judgment of acquittal on the ground that the

government failed to prove, as the indictment charged, that the property obtained by the defendants was lawfully owned by the prosecution's main witness, Hans Buhler, and that the denial by the District Court of the appellant Benson's request for a one-week adjournment in the start of the trial was a gross abuse of discretion.

In its decision, annexed to this petition, a panel of this Court agreed that the question of whether a conviction under 18 U. S. C. 2314 could be obtained when the prosecution has failed to prove that the property obtained by false pretenses was lawfully owned by the person defrauded was one that had never been previously litigated or discussed in a federal prosecution.

The Court, in affirming the conviction of the appellant Benson, held that the criminal background or gullibility of the person defrauded was not relevant as to whether a conviction was proper under the second paragraph of 18 U. S. C. 2314. The Court found that Buhler had not acted in particeps criminis with the defendants in this case, based on the evidence that was before the District Court, and commented on, but did not decide, whether the statute would protect those who acted in particeps criminis with the defendants who had defrauded them.

The Court further found that the common law distinctions between the various forms of larceny had been abolished in federal prosecutions and the effect of this had been to expand the scope of Section 2314 beyond the boundaries of the old statutory crime of false pretenses.

The heart of the Court's decision is that since Section 2314 does not require the victim to suffer any loss, the issue of who had title to the property obtained by false pretenses was irrelevant. The Court points to an earlier decision, United States v. Regent Office Supply Co., 421 F.2d 1174 (2nd Cir. 1970), requiring no proof of loss under 18 U.S.C. 1341 and, relying on the close relationship between Sections 1341 and 2314, holds that this case is applicable to both 18 U.S.C. 1343 and 2314.

The Court in upholding the District Court's denial of Benson's motion for a continuance during the trial to depose Werner Barth, a Swiss jeweler, finds that proof of Buhler's two prior convictions for embezzlement and the government's stipulation that Buhler had not declared the stones when he entered the United States, along with counsel's arguments to the jury that Buhler was a smuggler and a jewel thief, was sufficient material to impeach Buhler's credibility which, as the opinion holds, was very much in issue.

ARGUMENT

POINT I

THE JUDGMENT OF THIS COURT SUSTAINING THE ORDER OF THE DISTRICT COURT DENYING BENSON'S MOTION FOR A JUDGMENT OF ACQUITTAL VIOLATES DUE PROCESS OF LAW.

The legislative history that accompanied the passage into law of the second paragraph of 18 U.S.C. 2314 shows that Congress in enacting this legislation was concerned with the plight of the honest citizen losing the savings of a lifetime, not with the protection of thieves in their dishonest endeavors.[1] The decisions of our Courts over the last thirty years in construing the National Stolen Property Act now encompassed in part in Section 2314 reflects this concern for the honest citizen in the lawful possession of his property. In United States v. Handler, 142 F.2d 351, 353 (2nd Cir. 1944), a panel of this Court (L. Hand, Swan, and Augustus N. Hand, C.J.J.) stated:

> " Stealing having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprived the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word purloin . . . In our opinion the statute is applicable to any taking whereby a person dishonestly obtains goods or securities belonging to another with

1. H.R. Rep. 2474, 1956 U.S. Code Cong. and Ad Min. News 3036-38.

> the intent to deprive the owner of the rights and benefits of ownership."

The question is not whether an individual is gullible or even one with a criminal past, but whether in the transaction complained of the individual defrauded acted in particeps criminis with the defendants the policy was set forth in McCord v. People, 46 N.Y. 470, 472 (1871) in the following terms:

> " Neither the law or public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness, as between each other, in their dishonest practices. The design of the law is to protect those who, for some honest purpose are induced, upon false and fraudulent representations, to give credit or part with their property to another and not to protect those who, for unworthy or illegal purposes, part with their goods."

This policy laid down almost one hundred years ago still retains its validity today among the various states of this republic as witnessed by the holding of the New Jersey courts in State v. Donohue, 84 N.J. Super. 226 (1964), where the Court, in dismissing the indictment stated:

> " The indictment makes it abundantly clear that if the allegations of the indictment are true both the defendant and James Young were engaged in a conspiracy to violate the laws of the State of Louisiana or to corrupt some person or persons for the purpose of having the said James Young illegally admitted to the Bar of the State of Louisiana . . . N.J.S. 2A:111-1, N.J.S.A. by its wording was primarily designed to protect people, par-

> ticularly the gullible, from being cheated as the result of false promises and representations. It certainly was not designed to make it possible for a co-conspirator to claim he was cheated where the defendant is charged with claiming to bring about an illegal result with the knowledge and consent of the co-conspirator . . . It is certainly "absurd" and "incredible" that a person who enters into an illegal agreement can claim or be held to have been deceived and cheated thereby . . . "

In this case had the defense been given the opportunity to obtain the deposition of Werner Barth, the individual identified by Buhler as the seller of the diamond, then it could have been established, before the Trial Court and jury, that Buhler was a thief and that he had obtained the stones illegally. The situation would not have been, as Buhler described it, a lawful sale of a stone, but would have depicted Buhler as a thief trying to dispose of stolen goods and having a falling out with his co-conspirators.

Barth's deposition would have established that Hans Buhler was acting in particeps criminis with the defendants in this matter, and this does not present a situation that Section 2314 was enacted to deal with.

In enacting 2314 Congress did not intend, nor did it abolish all the common-law distinctions that existed in the common law crimes of larceny. The Congress enacted a law that by its language abolished the distinctions between false representations of past facts and future facts, but the statute gives no indication of abolishing the requirement that the defrauded owner of property have title to that property. To the contrary,

the legislative history seems to indicate that the person defrauded should have title to the property taken by fraud.[2]

The Court was mistaken when it stated in its opinion that no proof of loss was necessary in a prosecution under 18 U.S.C. 2314 and 1343 citing United States v. Regent Office Supply Co., 421 F.2d 1174 (2nd Cir. 1970). The Court in that case held that:

> " . . . We believe the statute [18 U.S.C. 1341] does require evidence from which it may be inferred that some actual injury to the victim, however slight, is a reasonably probable result of the deceitful representations if they are successful."
> United States v. Regent Office Supply Co., supra, 421 F.2d at 1182.

Since the Court speaks in terms of injury to the victim rather than a benefit to the perpetrator, the status of the property in the hands of the party defrauded becomes of critical importance. The only party who could be injured would be the lawful owner and possessor. A thief may suffer disappointment by being defrauded of his ill-gotten gains, but he will not suffer an injury of which the law will, or should, take notice.

This is a case where the prosecution pleaded and sought to prove that Buhler was the lawful owner of the stones. The failure of proof in this matter left the government without a critical element of the crime charged.

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2. H.R. Rep. 2474, 1956 U.S. Code Cong. and Admin. News 3038.

POINT II

THE JUDGMENT OF THIS COURT SUSTAINING THE ORDER OF THE DISTRICT COURT DENYING BENSON'S MOTION FOR A CONTINUANCE DURING THE TRIAL VIOLATES APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The appellant Benson was arraigned on the indictment on Friday, May 7, 1976. He appeared with counsel on Monday, May 10, 1976 and requested the trial be adjourned one week from May 24th to June 1st, 1976 to allow time to interview and investigate the government's witnesses, some of whom were Swiss nationals residing in Switzerland. Benson's counsel retained the services of an attorney and an investigator in Switzerland almost immediately.

Shortly after May 13, 1976 Benson's counsel obtained a copy of an examination before trial of Hans Buhler conducted in connection with a civil suit Buhler has brought against these defendants and others in the Supreme Court of the State of New York. In the EBT, Buhler identified one Werner Barth, a Swiss jeweler, as being the seller of a 9.90 carat diamond that he had bought in July, 1974 and that he had lost in December, 1974.

Upon learning Barth's identity and his alleged role in the sale of the 9.90 carat diamond, Benson sought to have his investigator interview Barth in Zurich. Barth was not in Zurich, however, as the investigator stated in his report dated May 19, 1976, and did not return to Zurich until after the trial had started.

During the trial, on May 26, 1976, Buhler testified that the previous night he had spoken to the party from whom he had bought the diamond, a jeweler named Barth in Zurich, whom he described as being one of the biggest jewelers in Zurich.

On May 27, 1976 Benson's counsel informed the court that he had been informed by his investigator that Barth had been interviewed in Zurich, and admitted knowing Buhler and having dealt in valuable stones with Buhler, but denied having sold a 9.90 carat diamond to Buhler. A sworn statement by Benson's investigator, setting forth his conversation with Barth was prepared and sent to New York, but it did not arrive until after the jury began their deliberations.

The jury only heard the claims by Buhler as to the origin and ownership of the diamond. They did not hear Barth's testimony and his refutation of Buhler's claims.

Defense counsel's arguments that Buhler was a thief and a smuggler, obviously did not have much impact upon the jury, nor could they be expected to, since counsel's arguments are not evidence. Without Barth's testimony and the documents that counsel sought to subpoena from United States Customs detailing Buhler's entry into the United States only to have the Court squash the subpoena, there was no evidence to support the arguments of defense counsel.

The Court in its opinion suggests that the proof of Buhler's two convictions was sufficient material to allow Buhler to be impeached as a witness, but the presence of a witness' list of convictions is not the basis for effective cross-examination. United States v. Baum, 482 F.2d 1325, 1332 (2nd Cir. 1973).

The government's stipulation concerning the customs declaration prepared by Buhler in December, 1974 when he arrived at Los Angeles and did not declare the two stones did not comport with the facts as they actually existed.

A copy of the customs declaration was provided to counsel on August 25, 1976, the date that Benson was sentenced. A subsequent investigation revealed that it had been prepared by Hans Buhler, Sr., the father of the witness, and thus did not nor could it substantiate the government's claim about Buhler being in Los Angeles with the stones in December, 1974.

The argument of defense counsel was that the stones were never in the United States in December, 1974 and this declaration had it been available then would have substantiated that claim.

Counsel sought to argue that when Buhler claimed to have been robbed in Bogota in 1974 of $110,000 that that money came from the sale of this diamond. This argument could not be supported, especially in view of Buhler's claim that he had notified the police in Colombia of this incident.

Once again an investigation only completed after the trial because of limitations imposed by an insufficient amount of time to prepare kept the jury from learning that Buhler had never reported any incident at all to the police in Colombia in 1974.

The defense contended that Buhler was a rip-off artist who made claims of business losses to his partners and associates to cover his absconding with and misappropriating the money of others. This claim could have been established to satisfy a jury if the report of the Colombian National Police had been available, but without the report counsel's argument were unpersuasive as they obviously could not take the place of evidence itself.

> " A myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."
> Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

The Court by this decision has created a situation where a defendant's right to the effective assistance of counsel was sacrificed to the cult of expediency. Where the prosecution, in filing his notice of readiness, asked for thirty days notice to enable him to prepare for trial, this was clear and sufficient notice to the District Court that any counsel preparing this suit for trial would need at least as much time.

CONCLUSION

For the above-stated reasons, the judgment of this Court should be vacated and the judgment of the District Court reversed and the case remanded for dismissal of the indictment or granting Benson a new trial.

Respectfully submitted,

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APPENDIX

PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 540, 541, 544—September Term 1976.

(Argued December 16, 1976 Decided January 6, 1977.)

Docket Nos. 76-1404, 76-1412, 76-1419

UNITED STATES OF AMERICA,

Appellee,

—against—

HARRY LEVINE BENSON, HERBERT KAMINSKY and MARI-ANN DANISE,

Defendants-Appellants.

Before:

MULLIGAN, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Appeals from judgments of conviction for violations of 18 U.S.C. §§ 371, 1343 and 2314 after a jury trial in the United States District Court for the Southern District of New York, Hon. Charles H. Tenney, *Judge.*

Affirmed.

ALAN LEVINE, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Audrey Strauss, Assistant United States Attorney, of Counsel), *for Appellee.*

GILBERT EPSTEIN, New York, New York (Stokamer & Epstein, New York, New York), *for Defendant-Appellant Benson.*

GRETCHEN W. OBERMAN, New York, New York, *for Defendant-Appellant Kaminsky.*

PHYLIS S. BAMBERGER, New York, New York (William J. Gallagher, Legal Aid Society, New York, New York), *for Defendant-Appellant Danise.*

MULLIGAN, *Circuit Judge:*

The appellants Herbert Kaminsky and Harry Levine Benson were convicted on June 2, 1976 after a jury trial before the Hon. Charles H. Tenney, United States District Court for the Southern District of New York, on three counts of an indictment charging 1) conspiracy to defraud, 2) the use of a wire communication in interstate and foreign commerce in the execution of the scheme to defraud, and 3) inducing an individual to travel in interstate and foreign commerce in the execution of a scheme to defraud in violation of 18 U.S.C. §§ 371, 1343 and 2314. The defendant Mari-Ann Danise was found guilty on the two substantive counts but the jury was unable to reach a verdict as to her on the conspiracy count. The convictions are affirmed.

The victim of the swindle was one Hans Buhler, a Swiss diamond merchant, who brought to the United States two precious stones, a 9.88 carat diamond and a 8.35 carat emerald which together were valued at more than $200,000. Kaminsky and Danise obtained possession of the diamond from Buhler in New York on the pretext that they wished to have it appraised and shown to a prospective customer. Buhler received in exchange a cash memorandum receipt. The defendant Benson was then introduced to Buhler by Kaminsky as the purported buyer. Buhler thereupon gave the emerald to Kaminsky as a commission for the sale.

He never saw either stone again. The defendants through a series of false representations then induced Buhler to make trips to Chicago, London, Zurich, New York and Las Vegas. The well travelled Buhler was unable to recover either the stones or the purchase price and finally realizing that he was the victim of a fraudulent scheme, advised the Federal Bureau of Investigation.

Appellants raise a variety of points on appeal which we consider to be meritless. However, one issue apparently has never been litigated or discussed since there is no reported federal opinion directly in point. Although the indictment named Buhler as the owner of the precious stones and the Government maintained this position throughout the trial, appellants argue that Buhler's claim that he purchased the diamond from a private party through one Werner Barth, a Zurich jeweler, was false and that the court below abused its discretion in failing to grant a continuance during the trial so that Barth's deposition could be obtained in Switzerland. Appellants had interviewed but not deposed Barth in Switzerland and he indicated that he had not sold any 9.88 carat diamond to Buhler. Appellants urge that a conviction under 18 U.S.C. § 2314 cannot be properly obtained unless the Government can establish that the property obtained by the false pretenses of the defendants was lawfully owned by the person defrauded.

Appellants urge that the second paragraph of section 2314[1] which is here relevant was enacted by Congress in

1 The relevant paragraph of 18 U.S.C. § 2314 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more. . . .

1956 to protect "honest citizens" and that the Barth deposition would establish that Buhler had no title to the diamond and that he in fact was a jewel thief not within the ambit of the statute. The legislative history of the statute depended upon by appellants[2] indicates that Congress was concerned that the victims of confidence men included "retired persons, widows and also business and professional men," but of course Congress was also concerned that "our laws must be kept at a peak level of effectiveness in order to deal with these criminals." It would hardly comport with this congressional concern were we now to exculpate confidence men who prey upon citizens (or even aliens) whose character is suspect. We cannot reasonably or fairly interpret the broad congressional concern for the honest citizen expressed in the House Report cited in footnote 2 to support a congressional intent that others are fair game for the swindler. It is accepted that the prostitute may be raped, the burglar's home burgled, the killer murdered and the thief a victim of larceny. Such a restricted and unusual interpretation of section 2314 as urged by appellants would have to be demonstrated by clear language in the statute itself and there is nothing on its face or in the legislative history to support the strained reading urged upon us. While it is generally held in a civil suit where both parties are guilty of criminal behavior with respect to the cause sued upon, that the court will leave the parties

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2 Appellants cite the following language from H.R. Rep. No. 2471, reprinted in 1956 U.S. Code Cong. and Admin. News 3036, 3038:

> Each year many of our citizens are cheated by confidence men. As observed in the Attorney General's communication to the Congress, in many instances the targets of these unscrupulous criminals have been retired persons, widows and also business and professional men. These people lose large sums of money to this group of criminals. The committee is of the firm conviction that our laws must be kept at a peak level of effectiveness in order to deal with these criminals, and protect honest citizens from their operations.

where it finds them and refuse to act as a referee among thieves, a criminal action is on a manifestly different footing. Buhler is not the plaintiff here. The United States has brought a criminal proceeding against defendants alleged to have engaged in a crude swindle which induced Buhler to travel in interstate and foreign commerce. Buhler's gullibility or his own criminal background is not relevant to the inquiry as to whether the defendants were properly convicted under section 2314.

Appellants only authority for this position, aside from the legislative history which we have recited, consists of two ancient New York cases, *McCord* v. *People*, 46 N.Y. 470 (1871) and *People* v. *Tompkins*, 186 N.Y. 413 (1906), both of which involved victims of confidence men who were induced to part with property in exchange for the performance of an illegal act. These cases are not in point since Buhler parted with the diamond expecting it to be appraised and shown to a bona fide customer. He surrendered the emerald to pay a commission for what he was led to believe was a lawful sale. In any event, in *Tompkins* the court reluctantly followed *McCord* indicating that at least 12 other states had rejected the narrow New York view which even then was too restricted to permit the practical administration of criminal justice. *People* v. *Tompkins*, *supra*, 186 N.Y. at 416.

Appellants also argue that under these cases and generally in the states, a defendant could not be properly convicted of the crime of obtaining property by false pretenses unless the victim was persuaded to part with title to the goods. If he was merely deprived of possession, he could only be properly charged with the common law crime of larceny by trick.[3] Since it is claimed that Buhler did not

3 *People* v. *Barnett*, 31 Cal. App. 2d 173, 88 P. 2d 172 (Dist. Ct. App. 1939); *People* v. *Noblett*, 244 N.Y. 355, 155 N.E. 670 (1927); *Whitmore* v. *State*, 238 Wis. 79, 298 N.W. 194 (1941).

have title to the jewels, appellants urge that he could not be properly convicted under section 2314. The appellants are correct in their appraisal of the common law distinctions which did exist among the various types of theft. However, their reliance on them today is without any justification.

The states generally have abolished the distinctions which had existed among the crimes of obtaining property by false pretenses, larceny by trick, embezzlement and larceny by trespass. These distinctions which bedeviled prosecutors, law students and even law professors have long since disappeared. See generally Fletcher, The Metamorphosis of Larceny, 89 Harv. L. Rev. 469 (1976); Goodhart, The Obsolescent Law of Larceny, 16 Wash. & Lee L. Rev. 42 (1959). In New York the distinctions have been obsolete since 1942.[4] They are similarly extinct in federal jurisprudence.

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4 The addition of § 1290 to the former New York Penal Law in 1942 eliminated the common law distinctions among the various forms of theft by the following definition of larceny:

> A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.

The section eliminated the defense that:

> 2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property. . . .

The Historical Note, Laws 1942, ch. 732, § 1, makes this legislative intent clear:

> It is hereby declared as the public policy of the state that the best interests of the people of the state will be served, and confusion and injustice avoided, by eliminating and abolishing the

In *Morissette* v. *United States*, 342 U.S. 246, 272-73 (1952), Mr. Justice Jackson extensively reviewed the underlying federal larceny statutes codified in 18 U.S.C. § 641. After noting that the states had generally abolished the distinctions among the various types of theft, he concluded that "[t]he purpose which we here attribute to Congress parallels that of codifiers of common law in England and in the States and demonstrates that the serious problem in drafting such a statute is to avoid gaps and loopholes between offenses." (footnotes omitted).

Again in *United States* v. *Turley*, 352 U.S. 407, 412-13 (1957), the Court gave a broad construction to the term "stolen" in the National Motor Vehicle Theft Act (18 U.S.C. § 2312) and rejected the view of those circuit courts which would have limited the term to common law larceny.

More directly in point is *Lyda* v. *United States*, 279 F.2d 461 (5th Cir. 1960), where the court was called upon to construe the first paragraph of 18 U.S.C. § 2314.[5] The defendant urged that the term "stolen" goods should be interpreted restrictively to cover only a case where the taking of the property was unlawful (common law larceny by trespass) and not one where the property was surrendered to the defendants who later converted it (embezzlement). The court rejected the argument, relying in

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distinctions which have hitherto differentiated one sort of theft from another, each of which, under section twelve hundred and ninety of the penal law, was denominated a larceny, to wit:

common law larceny by asportation, common law larceny by trick and device, obtaining property by false pretenses, and embezzlement.

See New York Penal Law § 155.05.

5 The first paragraph of § 2314 provides:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud. . . .

part upon Mr. Justice Stewart's opinion in *Bergman* v. *United States*, 253 F.2d 933, 935 (6th Cir. 1958), where the then Circuit Court Judge held. "The issue as to whether the goods were obtained by one of the unlawful methods of acquisition referred to in the statutes is not to be decided upon the basis of technical common law definitions."

In *Lyda* Judge Brown, while holding that the phrase "converted or taken by fraud" in section 2314 need not be interpreted under the facts in that case, nonetheless observed, 279 F.2d at 464:

> The aim of the statute is, of course, to prohibit the use of interstate transportation facilities for goods having certain unlawful qualities. This reflects a congressional purpose to reach all ways by which an owner is wrongfully deprived of the use or benefits of the use of his property. It was one way to meet the difficulties in legislative draftsmanship. The experience with this Act, the Dyer Act, and others bears witness that "what has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches." *Morissette* v. *United States*, 1952, 342 U.S. 246, at page 271, 72 S.Ct. 240, at page 254, 96 L.Ed. 288, at pages 304-305. Congress by the use of broad terms was trying to make clear that if a person was deprived of his property by unlawful means amounting to a forcible taking or a taking without his permission, by false pretense, by fraud, swindling, or by a conversion by one rightfully in possession, the subsequent transportation of such goods in interstate commerce was prohibited as a crime. Since the aim of Congress was to reach all such deprivations, it would distort that purpose if by a sort of reverse process the transaction

under review had to consider whether the property was stolen *or* converted *or* taken by fraud. The contiguous presence of all three descriptives lends meaning to each.

In light of these holdings, it is evident that section 2314 cannot be properly interpreted to limit its application to the ancient statutory crime of obtaining property by false pretenses.

Secondly, the language of section 2314 here relevant itself simply condemns the inducing of "any person to travel in . . . interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more." There is no language in the paragraph which requires that the victim actually be deprived of any property at all—the scheme or artifice need only induce the travel not the loot. Hence the statute cannot be truly analogous to either common law larceny by trick or obtaining property by false pretenses. Buhler's title to the gems thus becomes irrelevant. While proof of his surrender of them to the defendants assists the Government in establishing the scheme and intent of the defendants, the loss of property is not part of the corpus delicti of the crime in paragraph 2 of section 2314. Hence, the Government's consistent position that Buhler actually owned the gems was not necessary to its case and actually created the diversion which prompted this appeal.

This construction of section 2314 is consistent with our prior interpretation of the mail fraud statute, 18 U.S.C. § 1341. In *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174, 1180-81 (2d Cir. 1970), we held that no proof that the victim of the swindle was actually defrauded or suffered any loss was necessary. The close relationship between the mail fraud statute and the second paragraph

of section 2314 has been made clear by Congress.[6] The wire fraud statute, 18 U.S.C. § 1343 has also been construed to require no proof that the intended victim was actually defrauded or suffered loss. "To hold otherwise would lead to the illogical result that the legality of a defendant's conduct would depend on his fortuitous choice of a gullible victim." *United States* v. *Pollack*, 534 F.2d 964, 971 (D.C. Cir. 1976).

Appellants argue that Barth's testimony, as well as other evidence which might establish that his title to the gems was suspect, should have been admitted below in any event to impeach Buhler's credibility. We cannot agree. Aside from the fact that the United States Attorney has represented that a phone call to Barth indicated that he would not speak about the matter and wanted to have nothing to do with it, Buhler's credibility was very much in issue. The Government stipulated on trial that Buhler had not declared the gems upon his entry to the United States. Buhler's extensive criminal record including two convictions for embezzlement in Switzerland was placed before the jury. The defendants argued to the jury that he was a smuggler and a jewel thief. Obviously the jury found that he was the victim of a swindle and we find no abuse of discretion below in either denying the continuance or

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6 H.R. Rep. No. 2474, 1956 U.S. Code Cong. and Admin. News 3036, 3038 states the intent of Congress to fill the interstices left by the mail fraud statute with the second paragraph of § 2314 in the following language:

> In combating this sort of criminal activity, the Department of Justice has found that our present Federal laws are inadequate when it comes to dealing with the criminal who utilizes travel by the victim in the perpetration of the scheme to defraud that individual of his money. Such criminals avoid prosecution under the mail fraud statutes (sec. 1341 U.S.C., title 18) by not using the mails. . . .
>
> This proposed legislation is intended to remedy this present lack in the law. . . .

in refusing to admit other collateral cumulative material reflecting on his credibility. *United States* v. *Fratiani*, 501 F.2d 1234, 1237 (2d Cir. 1974); *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), cert. denied, 416 U.S. 940 (1974).

Affirmed.

Rec'd 1/20/77
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S.D.N.Y.